Jude Philomen Benny v Majlis Peguam Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO 17–81 OF 1996
NIK HASHIM JC
4 JUNE 1997

Legal Profession *— Admission — Ad hoc — Singaporean lawyer — Whether the applicant possessed special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia — Legal Profession Act 1976 s 18(1)*

The applicant, who was an advocate and solicitor specializing in shipping and admiralty law in Singapore, made an application under s 18(1) of the Legal Profession Act 1976 ('the Act') seeking to be admitted as an advocate and solicitor of the High Court of Malaya for the ad hoc purpose of appearing as an advocate for and on behalf of the defendant in Kuala Lumpur Civil Suit No S1–22–500 of 1992 ('the civil suit'). In his supporting affidavit and curriculum vitae, the applicant claimed, inter alia, that he had special qualifications and experience pertaining to marine insurance claims which were necessary in the civil suit.

The application was not opposed by the Attorney General but by representatives of the Bar Council and the Kuala Lumpur Bar Committee, whose main ground of objection was that the applicant had no special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia. The chairman of the Kuala Lumpur Bar Committee contended that the issues raised in connection with the civil suit were not difficult issues of marine insurance law but were issues encountered regularly in marine insurance which had already been dealt with and litigated in Malaysia in a number of cases in which local Malaysian counsel had appeared. It was also argued that the applicant was not competent in Bahasa Melayu, contrary to the requirement of s 8 of the National Language Act 1963/67. The question for the court was whether the applicant possessed special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia.

Held, dismissing the application:

The onus was on the applicant to show that he had special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia.

In this case, the issues raised in the civil suit were not novel or complex issues which have not been dealt with before by Malaysian lawyers. Further, the applicant had not demonstrated his special qualifications and experience relating to his advocacy skill as a trial lawyer. Nor had he shown by means other than affidavit evidence that he possessed the necessary qualifications and experience to

deserve admission as an advocate and solicitor in Malaya. There was also no hard proof to substantiate his expertise. Bare statements without supporting and independent evidence were not sufficient to satisfy his claims. Therefore, the qualifications and experience of the applicant as evidenced in court could not be classified as special and of a quality which could not be had amongst local lawyers (see pp 309I, 311D and 312A–B); *Re Graham Starforth Hill* [1971] 2 MLJ 269, *Re B Larbalestier QC* [1988] 1 MLJ 135, *Re SK Lee* [1971] 2 MLJ 40 followed and *Re Michael John Mustill* [1971] 1 MLJ 175 distinguished.

Obiter:

With regard to the requirement of s 8 of the National Language Act 1963/67 and the complaint that the applicant did not have the competency in Bahasa Melayu, while competency in Bahasa Melayu is important in litigation, the issue of the national language and its competency was not quite relevant at the application stage for the purpose of ad hoc admission. The question of court language is a matter for the trial judge (see p 312C–D).

[Bahasa Malaysia summary

Pemohon yang merupakan seorang peguambela dan peguamcara yang mengkhusus dalam undang-undang perkapalan dan admiralti di Singapura, membuat permohonan di bawah s 18(1) Akta Profesion Undang-Undang 1976 ('Akta tersebut') menuntut untuk diterima-masuk sebagai peguambela dan peguamcara Mahkamah Tinggi Malaya untuk tujuan ad hoc untuk bertindak bagi pihak defendan dalam Kuala Lumpur Guaman Sivil No S1–22–500 Tahun 1992 ('guaman sivil tersebut'). Dalam afidavit menyokong dan vitae kurikulumnya, pemohon mendakwa, antara lain, bahawa beliau mempunyai kelayakan-kelayakan dan pengalaman istimewa berkenaan dengan tuntutan-tuntutan insurans marin yang diperlukan dalam guaman sivil tersebut.

Permohonan itu tidak dibantah oleh Peguam Negara tetapi oleh wakil Majlis Peguam dan Jawatankuasa Peguam Kuala Lumpur, yang mana alasan utama bantahan adalah bahawa pemohon tidak mempunyai kelayakan-kelayakan atau pengalaman yang tidak boleh didapati di kalangan peguambela dan peguamcara di Malaysia. Pengerusi Jawatankuasa Peguam Kuala Lumpur menegaskan bahawa isu-isu yang ditimbulkan berkaitan dengan guaman sivil tersebut bukannya isu-isu undang-undang insurans marin yang sukar tetapi merupakan isu-isu yang sering dihadapi dalam insurans marin yang telahpun diuruskan dan dibuat litigasi di Malaysia dalam beberapa kes yang mana peguam tempatan Malaysia telah hadir. Adalah juga dihujahkan bahawa pemohon tidak cekap dalam Bahasa Melayu, bertentangan dengan kehendak s 8 Akta Bahasa Kebangsaan 1963/67. Persoalan bagi mahkamah adalah sama ada pemohon mempunyai kelayakan-kelayakan atau pengalaman istimewa yang mana tidak boleh didapati di kalangan peguambela dan peguamcara di Malaysia.

Diputuskan, menolak permohonan:

Adalah menjadi tanggungjawab pemohon untuk menunjukkan bahawa beliau mempunyai kelayakan-kelayakan atau pengalaman istimewa yang tidak boleh didapati di kalangan peguambela dan peguamcara di Malaysia.

Dalam kes ini, isu-isu yang ditimbulkan dalam guaman sivil tersebut bukannya suatu yang baru atau isu-isu yang kompleks yang belum diuruskan sebelumnya oleh peguam-peguam Malaysia. Selanjutnya, pemohon tidak menunjukkan kelayakan-kelayakan atau pengalaman istimewanya berkaitan dengan kemahirannya sebagai peguam bicara. Beliau juga tidak menunjukkan selain daripada dengan cara keterangan afidavit bahawa beliau mempunyai kelayakan-kelayakan dan pengalaman yang diperlukan supaya patut diterima sebagai peguambela dan peguamcara di Malaya. Juga tidak ada bukti kukuh untuk menyokong kemahirannya. Kenyataan kosong tanpa keterangan menyokong dan bebas adalah tidak memadai untuk memuaskan tuntutannya. Oleh itu, kelayakan-kelayakan dan pengalaman pemohon seperti yang diterangkan di mahkamah tidak boleh diklasifikasikan sebagai istimewa dan mempunyai kualiti yang tidak boleh didapati di kalangan peguam-peguam tempatan (lihat ms 309I, 311D dan 312A–B); *Re Graham Starforth Hill* [1971] 2 MLJ 269, *Re B Larbalestier QC* [1988] 1 MLJ 135, *Re SK Lee* [1971] 2 MLJ 40 diikut dan *Re Michael John Mustill* [1971] 1 MLJ 175 dibeza.

Obiter:

Berkenaan dengan kehendak s 8 Akta Bahasa Kebangsaan 1963/67 dan aduan bahawa pemohon tidak cekap dalam Bahasa Melayu, sementara kecekapan dalam Bahasa Melayu adalah penting dalam litigasi, isu bahasa kebangsaan dan kecekapannya tidak begitu relevan pada peringkat permohonan untuk tujuan penerimaan ad hoc. Persoalan bahasa mahkamah adalah perkara bagi hakim bicara (lihat ms 312C–D).]

Notes

For cases on ad hoc admission, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1345–1363.

Cases referred to

B Larbalestier QC, Re [1988] 1 MLJ 135 (folld)
Graham Starforth Hill, Re [1971] 2 MLJ 269 (folld)
Lee Bee Soon & Ors v Malaysia National Insurance Sdn Bhd [1980] 2 MLJ 252 (refd)
Leong Brothers Industries Sdn Bhd v Jerneh Insurance Corp Sdn Bhd [1991] 1 MLJ 102 (refd)
Michael John Mustill, Re [1971] 1 MLJ 175 (distd)
SK Lee, Re [1971] 2 MLJ 40 (folld)
Tay Wee Khyun v American International Assurance Co Ltd; The 'Yuling No 2' [1971] 1 MLJ 218 (refd)

The 'Melanie'; WN Mazzarol v United Oriental Assurance Sdn Bhd, Kuantan [1983] 1 MLJ 328 (refd)
Tuong Aik (Sarawak) Sdn Bhd v Arab-Malaysian Eagle Assurance Bhd [1996] 2 CLJ 134 (refd)

Legislation referred to

Legal Profession Act 1976 s 18(1)
National Language Act 1963/67 s 8

Karen Goonting (*Zaid Ibrahim & Co*) for the applicant.
RS Nathan for the Bar Council, Malaysia.
Dennis Appaduray for the Kuala Lumpur Bar Committee.

Nik Hashim JC: This is an application by originating motion under s 18(1) of the Legal Profession Act 1976 ('the Act') to enable Mr Jude Philomen Benny ('the applicant') to be admitted as an advocate and solicitor of the High Court of Malaya for the ad hoc purpose of appearing as an advocate for and on behalf of Malaysia National Insurance Sdn Bhd, the defendant in the Kuala Lumpur Civil Suit No S1–22–500–1992 ('the civil suit').

The learned Attorney General did not oppose the application. The representatives of the Bar Council and the Kuala Lumpur Bar Committee, however, took a united stand to oppose the application. Their main ground of objection was that the applicant had no special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia.

Section 18 of the Act deals with the subject of admission as an advocate and solicitor of the High Court in special cases on an ad hoc basis where if the applicant were a citizen of or a permanent resident in Malaysia, he would be eligible to be admitted as an advocate and solicitor of the High Court. The relevant parts of s 18(1) read:

> (1) Notwithstanding anything contained in this Act ... no person shall be admitted to practise as an advocate and solicitor under this subsection unless —
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> (a) for the purpose of that particular case he has, in the opinion of the Court, special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia; and
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> (b) he has been instructed by an advocate and solicitor in Malaysia.

In this case, it is not in dispute that the applicant has satisfied the requirement of para (b) of sub-s (1). The question for the court to consider is whether the applicant possesses special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia. The onus is on the applicant to show that he has special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia (see *Re Graham Starforth Hill* [1971] 2 MLJ 269 at p 270 and *Re B Larbalestier QC* [1988] 1 MLJ 135). Sharma J in *Re SK Lee* [1971] 2 MLJ 40 has interpreted the words 'special qualifications' to mean (at the same page):

> ... an accomplishment of an exceptional degree or such that excels in some way the measure of accomplishments reached by the advocates and solicitors of Malaysia. ... . Instances would be of persons who specialize, for example, in income tax law, or trade marks, divorce practice, shipping law, etc and have achieved such heights in the exercise of their profession that they stand out as great luminaries in the firmament of law.

In the words of Mohd Dzaiddin J (as he then was) in *Re B Larbalestier QC* (at the same page):

> I think what the law intended to mean is that special qualifications or experience are required to be of a quality and type which cannot be had amongst the advocates and solicitors in Malaysia.

Examples of those who were admitted because of their special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia are quite a few. In 1970, Mr Michael John Mustill QC and Mr Edward Frederick Noel Gratiaen QC, a former Solicitor-General of Ceylon, were admitted to a marine insurance case; in 1971, the late Sir Dingle Foot QC was admitted to appear in a seditious case; in 1974, Mr RJ Burrell QC was admitted to appear in a trade marks case; in 1979, Mr Louis Blom-Cooper QC was admitted to appear in an Official Secrets Act case; and in 1988, C Ross-Munro QC was admitted to appear in a case relating to constitutional and private and public international law. Now, what are the special qualifications or experience of the applicant in the instant case? According to the supporting affidavit and his curriculum vitae, the applicant was admitted to the Singapore Bar on 21 September 1983 and has specialized in shipping and admiralty law since 1983. He has had extensive experience in these areas, having had conduct of High Court and Court of Appeal proceedings as well as arbitrations in respect of shipping and admiralty matters in Singapore. He also claimed that he has special qualifications and experience pertaining to marine insurance claims in general, particularly with respect to incidence of sinkings.

Learned counsel for the applicant contended that what is required for the conduct of the civil suit is counsel who has the expertise in the navigational aspects of shipping, seamanship and the method of stability calculations of ocean-going vessels and the methods of salvage in order to be able to adduce evidence and cross-examine witnesses who would probably be familiar with or be experts in the specialized aspect of shipping.

Mr Cecil Abraham, the chairman of the Kuala Lumpur Bar Committee ('the chairman') stated in his affidavit in reply that the issues in the civil suit are: (a) locus standi; (b) insurable interest; (c) constructive total loss; (d) delay; (e) salvage; and (f) unseaworthiness. Learned counsel for the applicant agreed with these issues in the civil suit but added aspects of navigation as an additional issue. The chairman contended that these issues are not difficult issues of marine insurance law but are issues which are encountered regularly in marine insurance and which have already been dealt with and litigated in Malaysia in a number of cases in which local Malaysian counsel have appeared; and he listed five cases in support in the schedule to the affidavit. They are:

(i) *Tay Wee Khyun v American International Assurance Co Ltd; The 'Yuling No 2'* [1971] 1 MLJ 218;

(ii) *The 'Melanie'; WN Mazzarol v United Oriental Assurance Sdn Bhd, Kuantan* [1983] 1 MLJ 328;

(iii) *Lee Bee Soon & Ors v Malaysia National Insurance Sdn Bhd* [1980] 2 MLJ 252;

(iv) *Tuong Aik (Sarawak) Sdn Bhd v Arab-Malaysian Eagle Assurance Bhd* [1996] 2 CLJ 134; and

(v) *Leong Brothers Industries Sdn Bhd v Jerneh Insurance Corp Sdn Bhd* [1991] 1 MLJ 102.

The chairman also named 12 lawyers, including himself, available among the Malaysian advocates and solicitors who are equally competent in both marine insurance and maritime law.

On perusal of the cases referred to, it is my finding that the issues raised in the civil suit are not novel or complex issues which have not been dealt with before by Malaysian lawyers. For instance, in *'The Melanie'*, the issue of whether grounding a peril was insured against was discussed. In that same case, the defendant alleged that the plaintiff was incompetent or not qualified to navigate the vessel in the area. Therefore, both counsel in that case must have an understanding of navigation to effectively submit to the court. Further, in *'The Melanie'* as in *Tuong Aik (Sarawak)*, knowledge of maritime law is imperative to the determination of 'perils of sea'.

In *Re Michael John Mustill* [1971] 1 MLJ 175 the petitioner, a Queen's Counsel, was allowed to be admitted as an advocate and solicitor of the High Court of Malaya for the specific purpose as stated in his motion. The court held that the petitioner there had the requisite special qualifications and experience in marine insurance and charterparties sufficient to deserve admission as an advocate and solicitor in Malaya. In that case, the petitioner:

(i) had been engaged in the practice of commercial law in the English Bar for 15 years and was an expert in the field of marine insurance and charterparties;

(ii) was at that time the joint editor of the chapter dealing with marine insurance in *Halsbury's Laws*; and

(iii) was at that time the joint editor of the then current edition of the treatise entitled 'Scrutton on Charterparties'.

In that case, the petitioner's expertise was proven by his publications in (ii) and (iii) above. In the case before me, the applicant is neither a writer nor an editor. He has no publication to his credit. He is an advocate and solicitor of 13 years' experience who has been practising mainly in shipping and admiralty law in Singapore since 1983. He claimed that he had been regularly instructed by all the major shipping law firms in London and Hong Kong to act for them in litigation matters in Singapore. Yet not a single reported Singapore case of the High Court or the Court of Appeal in which the applicant had acted was cited in support of the application.

Thus, the applicant has not demonstrated his special qualifications and experience relating to his advocacy skill as a trial lawyer. Moreover, the applicant has not shown by means other than affidavit evidence that he possesses the necessary qualifications and experience. There was no hard proof to substantiate his expertise. Bare statements without supporting and independent evidence are not sufficient to satisfy his claims.

In my view, the qualifications and experience of the applicant as evidenced in court cannot be classified as special and of a quality which cannot be had amongst the local lawyers. His qualifications and experience are not an accomplishment of an exceptional degree that excels the accomplishment of lawyers in the country.

Lastly, with regard to the requirement of s 8 of the National Language Act 1963/67 and the complaint that the applicant does not have the competency in Bahasa Melayu, the national language, I am of the view that while competency in Bahasa Melayu is important in litigation, the issue of the national language and its competency is not quite relevant at the application stage for the purpose of ad hoc admission. The question of court language is a matter for the trial judge.

Therefore, having regard to all the facts in the supporting affidavits, it is my considered judgment that the applicant has failed to satisfy me under s 18(1) of the Act that for the purpose of the civil suit, he has special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia. I agree with the Bar Council and Kuala Lumpur Bar Committee that the civil suit is one which can quite competently be handled by a local advocate and solicitor.

The application is hereby dismissed.

Application dismissed.

Reported by Koay Sook Kuan